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No. 83-963

In the Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF LICENSE COMMISSIONERS
OF THE TOWN OF TIVERTON,
PETITIONER,

v.

LOUIS H. PASTORE, JR., in his capacity as
LIQUOR CONTROL ADMINISTRATOR of the
STATE OF RHODE ISLAND and
ATTIC LOUNGE, INC.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

BRIEF OF THE RESPONDENT LOUIS H. PASTORE, JR.

JOHN H. HINES, JR.
RHODE ISLAND STATE DEPARTMENT
OF BUSINESS REGULATION
LIQUOR CONTROL ADMINISTRATION
100 North Main Street
Providence, Rhode Island 02903
Attorney for Respondents

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I

QUESTION PRESENTED

Does the exclusionary rule, which bars the admission in a criminal trial of evidence obtained by an illegal search and seizure, apply to a coexistent intrasovereign civil proceeding for sanctions or forfeiture of an alcoholic beverage license to exclude evidence determined to have been obtained pursuant to an unlawful search and seizure.

TABLE OF CONTENTS

	Page
Question Presented	I
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
Summary of Argument	6
Argument	10
Conclusion	34
Appendix A	35
Appendix B	36
Appendix C	39

Table of Citations

Cases:

Beacon Restaurant, Inc. v. *Adamo*, 103 R.I. 698, 241 A.2d 291 (1968) 20

Boyd v. *United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1896) 16, 18, 19

Bridges v. *Superior Court*, 121 R.I. 101, 396 A.2d 97 (1978) 6, 9, 27

Camara v. *Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 ..... 14, 28

In re Camelot Court, Inc., 21 Bankr. 496 (D.R.I. 1982) 20

Chernov Enterprises, Inc. v. *Sarkas*, 109 R.I. 283, 284 A.2d 61 (1971) 19, 20

Commonwealth Liquor Control Board v. *Mottola's 51 Tavern, Inc.*, 37 Pa. Cmwlth. 234, 389 A.2d 1213 (1978) 9, 24

DiTraglia v. *Daneker*, 83 R.I. 227, 115 A.2d 345 (1955) 19

Eaton v. *Price*, 364 U.S. 263, 80 S.Ct. 1463 (1960) 34

Page

Elkins v. *United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed 2d 1169 (1960) 7, 11, 13, 21, 29

Finn's Liquor Shop v. *State Liquor Authority*, 25 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584, *cert. denied*, 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91 (1969) 5, 9, 24, 25

Illinois v. *Gates*, __ U.S. __, 103 S.Ct. 2317 (1983) 33

Immigration and Naturalization Service v. *Lopez-Mendoza*, __ U.S. __, 52 USLW 5190 (1984) 6, 10, 13, 14, 15, 18, 19, 20, 21, 22, 23, 28, 29, 30

LaPinta v. *New York State Liquor Authority*, 294 N.Y.S. 2d 947 (1968) 25

Leogrande v. *State Liquor Authority*, 269 N.Y.S.2d 433 (1966) 9, 24

Lopez-Mendoza v. *Immigration and Naturalization Service*, 705 F.2d 1059 (9th Cir. 1983) 6, 18

Malik v. *New York State Liquor Authority*, 294 N.Y.S.2d 948 (1968) 26

Mapp v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) 5, 6, 7, 9, 29

McPherson v. *New York City Housing Authority*, 365 N.Y.S.2d 862 (1975) 26

Miller v. *United States*, 357 U.S. 301 (1958) 31

Olmstead v. *United States*, 277 U.S. 438 (1928) 10, 12, 13

Pennsylvania Liquor Control Board v. *Leonardziak*, 2 110 Pa. Super. 511, 233 A.2d 606 (1967) 9, 24, 25

People v. *McGrath*, 412 N.Y.S.2d 801, 35 N.E.2d 541 (1978) 13, 26

Plymouth Sedan v. *Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) 5, 7, 16, 17, 18, 19, 23, 24, 26, 27

R.I. Opthalmological Society v. *Cannon*, 113 R.I. 16, 317 A.2d 124 (1974) 20

Page

Rice v. *Alcoholic Bev. Appeals Bd., Etc.*, 187 Cal. Rptr. 117 (App. 1982) 28

See v. *City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737 (1967) 14, 28

State v. *Spratt*, 120 R.I. 192, 386 A.2d 1094 (1978) 6, 9, 27

Stone v. *Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) 29

United States v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) 5, 8, 13, 14, 21, 28, 29, 30, 31, 32

United States v. *Janis*, 428 U.S. 96 S.Ct. 3021, 49 L.Ed. 2d 1046 (1976) 5, 6, 7, 8, 9, 13, 14, 16, 17, 18, 21, 23, 27, 28, 29, 30, 34

Vitterito v. *Sportsmen's Lodge & Restaurant, Inc.*, 102 R.I. 72, 228 A.2d 119 (1967) 20

Walder v. *United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed.2d 503 (1954) 29

Weeks v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914) 5, 6, 12

Statutes:

28 U.S.C. § 1253(3) 2

Rhode Island General Laws:

§3-5-23 ..... 3, 4, 8, 15, 26
§3-7-21 ..... 2, 4
§9-19-25 5
§42-35-9 ..... 2, 4, 8
§42-35-10 ..... 2, 4, 8
§42-35-14 ..... 2, 4, 8
§42-35-15 ..... 2, 4

Constitutional Provisions:

Page

United States Constitution:
Amendment IV 2, 10, 11, 13, 14, 28, 34
Amendment XIV 2

Miscellaneous:

McCree, Jr., *Civil Liberties and Limited Government*, National Forum, Fall, 39 (1984) 11
Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970) 31

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Opinions Below

The opinion of the Rhode Island Supreme Court in the instant case is reported at 463 A.2d 161 and appears at pages A-1 to A-10 in the Petition for Writ of Certiorari. The opinion of the Providence County Superior Court appears in the Appendix accompanying this brief at page 11.

Jurisdiction

The decision of the Rhode Island Supreme Court was rendered on July 18, 1983. The Petition for Writ of Certiorari was filed on December 13, 1983, and the Writ was issued on July 5, 1984. The Court's jurisdiction to review the decision of the Rhode Island Supreme Court by Writ of Certiorari is conferred by 28 U.S.C. Section 1257(3).

Constitutional Provisions Involved

1. The Fourth Amendment to the Constitution of the United States.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

2. The Fourteenth Amendment to the Constitution of the United States.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also relevant are Rhode Island General Laws §3-7-21; §42-35-9; §42-35-10; §42-35-14 and §42-35-15, each of which appears in the Appendix to this brief.

Statement of the Case

By granting certiorari in this case, this Court has agreed to review a decision of the Rhode Island Supreme Court, which decision in turn was a review of a lower Rhode Island court decision pursuant to a Certiorari Petition requested by the Board of License Commissioners of the Town of Tiverton, Rhode Island. In Tiverton, as in other Rhode Island cities and towns, the Town Council serves as a Board of License Commissioners for the purpose of granting, renewing, suspending, or revoking liquor licenses within the town. In March of 1977, Respondent, the Attic Lounge, Inc., was a duly licensed liquor-serving establishment within the Town of Tiverton. On March 11, 1977, several Tiverton police officers entered the Lounge pursuant to a search warrant and found stolen property (clothing) on the premises. As a result, two actions were initiated. Criminal proceedings were initiated against individuals associated with the Attic Lounge by the State of Rhode Island for possession of stolen property. At the same time, the Tiverton Town Council, acting as a Board of License Commissioners, revoked the bar's liquor license pursuant to Rhode Island General Laws §3-5-23 after a hearing at which evidence of the finding of the stolen property was presented. Rhose Island General Laws §3-5-23 provides for the revocation of a liquor license where a license holder permits any of the laws of the State of Rhode Island to be violated on the licensed premises. (R.I.G.L. §3-5-23 is recited in full at A-11 in the Appendix accompanying the Petition for Writ of Certiorari). The criminal proceedings were ultimately dismissed after a judge of the Rhode Island Superior Court (Rhode Island's criminal trial court) held that the search warrant obtained by the Tiverton police to search the Lounge was defective.[1]

The principals of the Attic Lounge, Inc., appealed the revocation of the Lounge's liquor license to Respondent, Louis

[1] The trial court's decision is unreported.

H. Pastore, Liquor Control Administrator for the State of Rhode Island. Pursuant to R.I.G.L. §3-7-21 The Administrator held a *de novo* hearing on July 6, 1978, and received undisputed evidence that a conviction for possession of stolen property had never been obtained against any individual associated with the Lounge.[2] The Administrator, believing that a conviction was necessary in order for a town to assert the provisions of R.I.G.L. §3-5-23 reversed the revocation of the Lounge's license and ordered that the license be reinstated.

Thereafter Petitioner filed an appeal to the Providence County Superior Court pursuant to the Administrative Procedures Act, R.I.G.L. §42-35-15[3] which affirmed the Administrator's ruling. The Superior Court held that the Administrator had erred in holding that a conviction was necessary to revoke a liquor license pursuant to R.I.G.L. §3-5-23. However, the Court held that because evidence of the stolen property at the Attic Lounge premises had been obtained pursuant to an invalid search warrant, the exclusionary rule barred the presentation of such evidence before the Board of License Commissioners which could not therefore rely upon it in revoking the Attic Lounge's liquor license.

Petitioner then filed a Petition for Writ of Certiorari with the Rhode Island Supreme Court seeking review of the Superior Court's decision. That petition was granted by the Rhode Island Supreme Court which reviewed the Superior Court's decision and affirmed the holding that the exclusionary rule ought properly to be extended to municipal liquor license revocation proceedings.

The Rhode Island Supreme Court in its decision discussed the genesis of the exclusionary rule, (which bars the admission

[2] The hearing is civil in nature and is governed by the Rhode Island Administrative Procedures Act, so-called, §42-35-9, §42-35-10, and §42-35-14. (R.I.G.L. Sections referred to are recited in full in Appendix B hereto.) (R.I.G.L. §3-7-21 is recited in full in Appendix A hereto).

[3] R.I.G.L. §42-35-15 is recited in full in Appendix C hereto.

in a criminal trial of evidence obtained by an illegal search and seizure) in *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and its later extension to state criminal trials in *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The acceptance of this rule in Rhode Island is symbolized by the enactment by the Rhode Island General Assembly of Rhode Island General Laws §9-19-25 (A-12 in Appendix in Petition for Writ of Certiorari) which codifies as an evidentiary rule in criminal trials in Rhode Island the provisions of *Weeks* and *Mapp*.

The Rhode Island Court first determined that the *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) decision stood for the proposition that the exclusionary rule should apply to proceedings that are " 'quasi-criminal' in character" and concluded that a hearing of suspension or revocation of an alcoholic beverage license was of such a quasi-criminal character to which the exclusionary rule applied.

The Rhode Island Court then referred to this Court's decision in *United States* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) in weighing the extent to which the application of the exclusionary rule to an administrative alcoholic beverages hearing would deter illegal searches and seizures. After examining various State Court decisions on this point, particularly *Finn's Liquor Shop* v. *State Liquor Authority*, 25 N.Y. 2d 647, 249 N.E.2d 440, 301 N.Y.S. 2d 584, *cert. denied*, 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91 (1969), the Rhode Island Court found that indeed on balance there was a deterrent effect and held that a Board of Liquor License Commissioners should not be permitted to avail itself of the fruits of an illegal search in order to impose sanctions upon the persons whose constitutional rights have been violated.

The Rhode Island Supreme Court considered this Court's decision in *United States* v. *Janis*, 428 U.S. 433, 96 S.Ct. 3021,

49 L.Ed.2d 1046 (1976), where this Court declined to extend the exclusionary rule to civil proceedings that were intrasovereign in nature. The Rhode Island Court, however, distinguished *Janis* by recognizing the case before it as being intrasovereign and reasoned that in any event, "the potential deterrent effect of the exclusionary rule on the agents of an intrasovereign agency is strong enough to outweigh the costs to society of refusing to admit evidence obtained in violation of constitutional imperatives."

The Rhode Island Court in reaching its decision cited as support for this intrasovereign distinction the decision of *Lopez-Mendoza* v. *Immigration and Naturalization Service*, 705 F.2d 1059 (9th Cir. 1983), a decision which was later reversed by this Court on other grounds[4] in its 1983-1984 term. *Immigration and Naturalization Service* v. *Lopez-Mendoza*, 52 USLW 5190 (1984).

In reaching its decision, the Rhode Island Court pointed out that in other instances, distinguishable from the one before it, the deterrent effect of applying the exclusionary rule was on balance outweighed by the societal costs involved.[5]

Summary of Argument

The exclusionary rule was first enunciated in *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and later extended to state criminal trials in *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 1801 (1961). Appropriate extension of the rule beyond criminal trials has

[4] The Rhode Island Court referred to and relied upon *Lopez-Mendoza* as concerns the intersovereign distinction enunciated in *Janis* in determining that in such a situation the exclusionary sanction is maximized since the offending officer and the prosecutor share a common goal. *Lopez-Mendoza* was reversed because the Court in applying the *Janis* balancing test to the benefits and costs of excluding concededly reliable evidence from a deportation proceeding the costs outweighed the deterrent benefits.

[5] *State* v. *Spratt*, 120 R.I. 192, 386 A.2d 1094 (1978), a probation-revocation hearing; and *Bridges* v. *Superior Court*, 121 R.I. 101, 396 A.2d 97 (1978), a bail-revocation hearing.

been a frequent issue for this Court to resolve. In the first few years following *Mapp*, resolution of this issue was generally in favor of extension. *Elkins* v. *United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1169 (1960) extended the rule to evidence obtained illegally by state authorities which was offered for use in a federal criminal proceeding.

In *One 1958 Plymouth Sedán* v. *Commonwealth of Pennsylvania*, 380 U.S. 693, 854 S.Ct. 1246, 14 L.Ed.2d 170 (1965), this Court held the rule required exclusion, in a civil forfeiture proceeding, of unlawfully obtained evidence. This non-criminal extension of the rule was justified by the Court in being applied to a proceeding civil in form, but deemed criminal in nature since the end result of the proceeding was forfeiture of a man's property by reason of prior criminal offenses. Later, in *United States* v. *Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 Lawyer's Edition 2nd 1046 (1976), this Court again dealt with the question of the civil application of the rule. In *Janis*, this Court determined that evidence seized by a state criminal law enforcement officer in good faith, but nonetheless in an unconstitutional manner, is admissible in a civil proceeding brought by or against the United States. In doing so, this Court held that extension of the role was not appropriate in "intersovereign" circumstances. The Court also recognized in *Janis* that in deciding in what types of proceedings application of the exclusionary rule is appropriate, one must weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs.

This case presents to the Court the issue of whether the exclusionary rule was properly applied to a municipal liquor license revocation hearing. Respondents believe that the determination of application and exclusion was appropriate inasmuch as the revocation proceeding is "quasi-criminal" in nature and also because the intrasovereign nature of the matter clearly warrants it. The hearings held on the issue of revoking such a license are contested and adversary in nature. (See

R.I.G.L. §42-35-14; §42-35-9; and §42-35-10 each of which are set forth in Appendix "B" to this brief). It is a proceeding pursuant to R.I.G.L. §3-5-23, to punish the holder of the license for past conduct that is unlawful. Therefore, the nature and character of the hearings under this statutory framework are "quasi-criminal" and the exclusionary rule is therefore properly extended to them.

To this backdrop of a "quasi-criminal" action, the balancing test enunciated in *United States* v. *Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976) and *United States* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) must be applied to determine whether the benefit of deterrence resulting from exclusion outweighs the social costs relevant to the law enforcement system.

In utilizing this balancing process, it is significant that the instant case, unlike *Janis*, *supra*, involves an intrasovereign proceeding. The Tiverton Police Department obtained the initial warrant to seize the goods (clothing) in question. The very same police officers testified at the license revocation hearing with regard to the evidence unlawfully seized. Under these circumstances, it is the local police officer who is the primary object of the sanction. It is his conduct that is to be controlled. When an offending officer and the prosecutor share a common goal, the deterrent effect of the exclusionary sanction is maximized.

On the other hand, the social costs of excluding the evidence are not significant or substantial. As is nearly always the case with the rule, relevant and reliable evidence would be rendered unavailable. However, as a practical result, the end result here is that the licensee retains his right to remain in business; a business unrelated to and not co-existensive with the unlawful evidence. As a licensee, he is still fully subject to the usual local regulation of his business activity in the ordinary course. This attenuation on the cost side makes it unlikely that any significant, much less substantial, costs are involved as a result.

In reaching its decision in this case, the Rhode Island Supreme Court took into account and weighed the social benefits as compared against the likely costs. In so doing, the Rhode Island Supreme Court determined that the deterrence value of the exclusionary rule in the context of the case was substantial. The Rhode Island court, in making this determination properly accorded great weight in the balancing process to the policy emphasis in *Mapp* that the deterrence of police misconduct and the policy that the government should not benefit from its own wrong-doing ought to be accorded great weight.

Moreover, the Rhode Island Supreme Court indicated in its decision that it is keenly aware of the weight that should be given in the balancing process as concerns two unrelated areas where they determined not to apply the exclusionary rule. *State* v. *Spratt*, 120 R.I. 192, 386 A.2d 1094 (1978); *Bridges* v. *Superior Court*, 121 R.I. 101, 396 A.2d 97 (1978).

Various other State Court decisions have clearly decided the same issue in favor of the position adopted by the Rhode Island Supreme Court. *Commonwealth Liquor Control Board* v. *Mottola's 51 Tavern, Inc.*, 37 Pa. Cmwlth. 234, 389 A.2d 1213 (1978); *Pennsylvania Liquor Control Board* v. *Leonardziak*, 2 110 Pa. Super. 511, 233 A.2d 606 (1967); *Finn's Liquor Shop* v. *State Liquor Authority*, 301 N.Y.S.2d 584, 249 N.E.2d 440 (1969), *cert. den.* 396 U.S. 840 (1969); *Leogrande* v. *State Liquor Authority*, 269 N.Y.S.2d 433 (1966). The aforementioned cases are strikingly similar in nature to the instant case, and the decisions in each of those cases strongly support the reasonings adopted by the Rhode Island Supreme Court.

In *Janis*, the Court's decision not to extend the exclusionary rule to an intersovereign setting resulted in no small part from the lack of empirical proof that the exclusionary rule actually is a substantial and efficient deterrent. However, due to the comparatively late judicial creation of the exclusionary rule, it is submitted that the jury is still out on that question and we

must therefore assess the rules efficacy over the long term in order to have it work its intended goal.

Moreover, the recent decision of this Court in *Immigration and Naturalization Service* v. *Lopez-Mendoza*, 52 USLW 5190 (1984) where reference was made to the comprehensive scheme of the INS for deterring Fourth Amendment violations by its officers indicates that the exclusionary rule does have the desired deterrent effect upon law enforcement officials. Furthermore, a recent three-year study of the search warrant process in seven United States cities determined that the exclusionary rule does serve as a disincentive to police officers to misuse or abuse their authority. This yet-unpublished study, prepared for the National Center for State Courts, is additional empirical proof of the efficacy of the rule.

Argument

I. THE EXCLUSIONARY RULE IS PROPERLY EXTENDED TO AN INTRASOVEREIGN CIVIL ADMINISTRATIVE LIQUOR LICENSE REVOCATION PROCEEDING TO EXCLUDE EVIDENCE RELEVANT TO THE LICENSE PROCEEDING WHERE THE EVIDENCE HAS ALREADY BEEN SUPPRESSED IN A CRIMINAL FORUM DUE TO THE UNLAWFULNESS OF THE SEARCH AND SEIZURE OF THAT EVIDENCE.

A. "The personal and individual goals of the several leaders of the American Revolution were varied, but there was an overwhelming consensus about securing for the people a body of rights, painted with a broad brush in the Declaration of Independence. In his characteristically persuasive language, Justice Louis Brandeis declared in his famous dissenting opinion in *Olmstead* v. *United States*, 277 U.S. 438 (1928):

> 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.' "

McCree, Jr., *Civil Liberties and Limited Government*, National Forum, Fall, 1984, at 39.

In part to protect this "right to be let alone," the Constitution was duly amended to include the Fourth Amendment prohibition against unreasonable searches and seizures. In order to meaningfully implement that prohibition and to effectuate the Fourth Amendment right of all citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures..." the exclusionary rule was adopted. The primary purpose of the exclusionary rule is to prevent and deter present and future unlawful governmental conduct, chiefly police conduct, and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

Initially, the exclusionary rule was considered to be broadly applicable against all unreasonable searches and seizures under the guise of law.

"The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the unreasonable searches and seizures under the guise of law.... The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures...should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all constitutions have a right to appeal for the maintenance of such fundamental rights....

This protection is equally extended to the action of the Government and officers of the law acting under it.... To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against unauthorized action." *Weeks* v. *United States*, 232 U.S. 383, 391-392, 394 (1914).

This broad application resulted, in part, from the then belief that basically there were but two courses to follow, to exclude or not to exclude. This belief is typified by Mr. Justice Holmes' dissent in *Olmstead:*

> "[W]e must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained.... We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." *Id.* at 470.[6]

Presently, it would appear that the application of the exclusionary rule depends solely upon whether its application in a particular type of proceeding will significantly further the goal of deterrence.[7] In making this determination, the Court has developed a balancing test to weigh the potential injury or cost to society as against the potential benefits of deterrence. *United States* v. *Calandra*, at 349-350; *United States* v. *Janis*, at 453-454. *Immigration and Naturalization Service* v. *Lopez-Mendoza*, 52 USLW 5190 (1984).

B. Admittedly, it has become a difficult task "to demarcate the seemingly inexhaustible reach of the exclusionary rule." *People* v. *McGrath*, 412 N.Y.S.2d 801, 804, 35 N.E.2d 541, 543 (1978), however, the constitutional mandate of the Fourth Amendment requires that the task be undertaken. The application of the exclusionary rule beyond that of a criminal proceeding to a civil matter is of fairly recent vintage.[8] For the first time, this Court has dealt squarely with this question in

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[6] This belief stated by Mr. Justice Holmes came to be associated with the 'imperative of judicial integrity' commented upon in *Elkins* v. *United States*, 364 U.S. 206, 222 (1960). However, this "imperative" has apparently since been either abandoned or shunted aside. See, *United States* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

[7] This perspective is made clear by Mr. Justice Blackmun in *Janis* where he states:

> "The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the court has noted in recent cases, this inquiry is essentially the same so the inquiry into whether exclusion would serve a deterrent purpose." (Citations omitted). *Ibid.* at 459 fn. 35.

[8] In *Janis*, the majority opinion noted that "the Court never has applied it to exclude evidence from a civil proceeding, federal or state." (Footnote omitted) *Ibid.* at 447. The Court further remarked at 456 that "The seminal cases that apply the exclusionary rule to a civil proceeding involve 'intra-sovereign' violations...."

the case of *Immigration and Naturalization Service* v. *Lopez-Mendoza*, 53 USLW 5190 (July, 1984). In *Lopez-Mendoza*, this Court at the outset acknowledged that a deportation proceeding "is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry...." (Citation omitted). After so characterizing the nature of deportation proceedings, this Court then proceeded at length to apply the exercise of balancing the likely social benefits of excluding unlawfully seized evidence against the likely costs as established in *Calandra* and *Janis*, supra.

In so doing, this Court determined that the application of the exclusionary rule is appropriate to certain civil proceedings. In other words, although this Court recognized that the deportation proceedings under review in *Lopez-Mendoza* were purely civil, nonetheless it went through the process of establishing and analyzing a balance sheet in accordance with the dictates of *Janis* to arrive at a result that the "*Janis* balance between cost and benefits comes out against applying the exclusionary rule in civil deportation hearings held by the INS." *Lopez-Mendoza*, at 52 USLW 5195. As a result, *Lopez-Mendoza* does stand for the principal that the framework for deciding in what types of proceding application of the exclusionary rule is appropriate does indeed apply to purely civil matters.

Therefore, it is no longer subject to question that Federal agencies, charged with purely administrative responsibilities, just as those engaged in the enforcement of the criminal law, must conduct their investigative and enforcement functions in compliance with constitutional requirements and, more particularly, within the confines of the Fourth Amendment. This is similarly applicable and extendable to State agencies as well. See, *Camara* v. *Municipal Court*, 387 U.S. 523, 530-531, 87 S.Ct. 1727, 18 L.Ed.2d 930; *See* v. *City of Seattle*, 387 U.S. 541, 87.

The instant case is a civil matter. However, unlike *Lopez-Mendoza*, it is not "a purely civil action to determine eligibility [to retain an alcoholic beverage license.]" It is a proceeding pursuant to R.I.G.L., §3-5-23, to punish the holder of the alcoholic beverage license for past conduct that is unlawful. The Town Council of the Town of Tiverton in sitting as a Board of License Commissioners to determine whether or not the Respondent's alcoholic beverage license should be revoked for the past unlawful conduct, has the power to either suspend or to revoke the license in question. In so doing, the Board of License Commissioners does both adjudicate guilt and punish the Respondent licensee for a criminal act related directly or indirectly to his licensed premises. Unlike the purpose of deportation, a license revocation hearing is structured and intended to punish past transgressions of the licensee. Certainly, such punishment has a prospective effect since if the license is revoked, then the licensee can no longer operate his business of selling and serving alcoholic beverages. However, unlike *Lopez-Mendoza*, this prospective effect does not lend itself nor can it be interpreted as being a continuing criminal act or crime.

As a result, the nature and character of the hearings of a local Board of License Commissioners pursuant to R.I.G.L. §3-5-23 are "quasi-criminal" in nature. The penultimate paragraph in §3-5-23 is further indication of the punitive nature of the local Board's decision of license revocation. It provides that under a revocation the licensee "shall be disqualified from holding any [alcoholic beverage license in Rhode Island] for a period of five (5) years next following such revocation. Moreover, the bond posted by the licensee is subject under §3-5-23 to be put in suit and "by due process of law the *penal* sum thereof shall be recovered for the use of said town or city." (Emphasis supplied).

This Court has previously determined and held that the exclusionary rule does apply to proceedings that are "quasi-

criminal" in nature. *Plymouth Sedan* v. *Commonwealth of Pennsylvania*, 380 U.S. 693, 854 S.Ct. 1246, 14 L.Ed.2d 170 (1965). In that case, the State of Pennsylvania sought to confiscate a vehicle pursuant to a statute that provided for the forfeiture of a vehicle carrying unsealed liquor. In collateral criminal proceedings, the owner was acquitted because of the exclusion of the illegally seized liquor. This Court held under those circumstances, that although forfeiture proceedings are essentially civil in nature, the exclusionary rule should apply. In so doing, this Court quoted with approval language from *Boyd* v. *United States*, 116 U.S. 616, 634, 6 S.Ct. 524, 534, 29 L.Ed. 746, 752 (1896), stating that:

> "if the Government prosecutor elects to waive an indictment, and to file a civil information against the claimants,—that is civil in form,—can he by this device take from the proceedings its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one.... As, therefore, suits for penalties and forfeitures incurred by the commission are offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution...." 380 U.S. at 697-98, 85 S.Ct. at 1249, 14 L.Ed.2d at 173.

C. In this context of a quasi-criminal action, we must now undertake the balancing exercise enunciated in prior decisions of this Court to weigh the likely deterrent benefits of excluding the unlawfully seized evidence against the likely social costs.

Unlike *Janis*, the application of the exclusionary rule in this case is intrasovereign. It was a Tiverton Policeman, acting

pursuant to a search warrant, who entered the licensed premises of the licensee. It was the very same Tiverton Policeman who would appear and who testifed in both the criminal action and the quasi-criminal license revocation hearing proceedings with regard to the evidence unlawfully seized.[9] In evaluating the need for a deterrent sanction, the step is to identify those who are to be deterred. In this case, it is the local police officer who is the primary object of the sanction. "It is his conduct that is to be controlled." *Janis* at 448. Under these circumstances, the further application of the exclusionary rule to the quasi-criminal license revocation proceedings would certainly contribute further to the deterrence of unlawful conduct by the municipal police officers. Under these circumstances of an intrasovereign situation within the same close community of Tiverton, it seems likely that the deterrence value of applying the exclusionary rule in the license revocation proceedings is higher than it was in *Janis*.

As the Rhode Island Supreme Court stated in its decision,

> "Thus, exclusion for purposes of deterrence would be unjustified if admission of the evidence would be expected to encourage future illegal searches by such agents because of their expectation that *in any event* the evidence would be admissible in the administrative process." (Emphasis supplied). Appendix A-5 Petition For A Writ Of Certiorari.

And as this Court noted in *Plymouth Sedan* at 701,

> "It would be anomalous, indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the for-

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[9] The Joint Appendix at page 4 sets out the proceedings held before the Board of License Commissioners. The Tiverton Chief of Police testified at that hearing that "he had received a tip from the Fall River Police Department that there were stolen goods on the property of the Attic Lounge, Inc., 469 Main Road, Tiverton, RI, obtained a serach warrant, entered premises, and discovered stolen property."

feiture proceeding requiring the determination that the criminal law has been violated, the same evidence would be admissible." (Footnote omitted).

And in *Lopez-Mendoza*, 52 USLW 5193, it was similarly noted that: "As recognized in *Janis*, the exclusionary rule is likely to be most effective when applied to such 'intrasovereign' violations."

The reasoning on this point of the court in *Lopez-Mendoza* v. *Immigration and Naturalization Service*, 705 F.2d 1059 (9th Cir. 1983) is equally compelling. They stated:

> "[When an] offending officer and the prosecutor share a common goal, the deterrent effect of the exclusionary sanction is *maximized:* An officer will have little incentive to violate the Fourth Amendment if he knows that tainted evidence will be worthless to the prosecutorial agency he serves." (Emphasis supplied) *Id.* at 1069.

This reasoning on the part of these cited cases is analogous to and in keeping with the concept originally stated in *Boyd* v. *United States*, supra, and weighs heavily on the benefit side of deterrence particularly in an intrasovereign situation of the kind presented here.

It is argued by Appellant that in the instant case, the seizing officer's primary objective would be to obtain the evidence for the purpose of a criminal prosecution and not for the collateral purpose of using that evidence in a civil license revocation proceeding. In response to that argument, it is Respondent's position that in an intrasovereign setting with quasi-criminal penalties, the assumption of the arresting officer's primary objective is not a strong consideration in determining the benefit of deterrence value of applying the exclusionary rule to the alcoholic beverage revocation proceeding. See *Boyd*, supra.[10]

[10] And as this Court stated in *Plymouth Sedan* at 700 fn. 7: "Nor has the continued validity of *Boyd* been in any way impaired by the decision of this Court in..." (Citations omitted).

The officer in question is from the Town of Tiverton and if an assumption is to be made, the reasonable inference would be that upon finding stolen goods upon the licensed premises of the Respondent that it would come to his mind that the licensee would be subject to having the local Town Council sitting as a Board of License Commissioners take action against his alcoholic beverage license. In this type of case where the seizure occurs upon the licensed premises in an intrasovereign situation, the criminal proceedings and the license revocation action are so parallel as to be basically equal in the minds of the intrasovereign agent. Most assuredly, the seizing officer was aware that as a result of the items seized upon the licensed premises that there would be action taken against the licensee and his license in addition to the expected criminal prosecution. "As recognized in *Janis*, the exclusionary rule is likely to be most effective when applied to such 'intrasovereign' violations, such as in the instant case." *Lopez-Mendoza*, 52 USLW 5193.

Along these lines, the Rhode Island Supreme Court in *Chernov Enterprises, Inc.* v. *Sarkas*, 109 R.I. 283, 284 A.2d 61 (1971) stated:

> "[Petitioner] completely ignores the established principal that a proceeding under the laws regulating the sale of alcoholic beverages is entirely separate and distinct from a criminal prosecution for the same offense, and that the two proceedings, rather than being interdependent or mutually exclusive, are co-existent. While one is in the nature of an action in rem, the other is against a licensee personally. Both may be instituted and pursued simultaneously or otherwise. *Id.* at 288, 64. See also *DiTraglia* v. *Daneker*, 83 R.I. 227, 115 A.2d 345 (1955).

And, as this Court noted in *Plymouth Sedan* at 701 fn. 11:

> "This Court in *Boyd* v. *United States*, supra, at 638, rejected any argument that the technical character of a for-

> feiture as an *in rem*, is not the nominal party, he is, nevertheless, the substantial party to the suit; he certainly is so, after making claim and defence; and, in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offence."

Moreover, unlike *Lopez-Mendoza*, there are no other factors in the instant case which "significantly reduces the likely deterrent value of the exclusionary rule in an alcoholic beverage license revocation proceeding."

For example, a hearing before a local Board of License Commissioners on the matter of suspension or revocation is basically a full-blown adversary proceeding with the burden of proof being upon the Board of License Commissioners to establish by a preponderance of the evidence, sufficient cause to take action of revocation or suspension. *Chernov Enterprises, Inc.* v. *Sarkas*, supra. It is not a simple, streamlined proceeding such as utilized in deportation proceedings.

Additionally, the evidence in question in the instant case was essential and central to the burden of proof of the local Board of License Commissioners if in taking their action of revocation, this central core evidence was not susceptible of being obtained or gathered independently of the seizure. The record reflects that the alcoholic beverage revocation decision was based exclusively upon the evidence seized unlawfully. That evidence was the sole evidence upon which it was determined that the licensee should forfeit his property by reason of committing a criminal offense.[11] The Board could not establish

[11] The Rhode Island Supreme Court has determined that an alcoholic beverage license has the indicia of a property right. See *Vitterito* v. *Sportemen's Lodge & Restaurant, Inc.*, 102 R.I. 72, 228 A.2d 119 (1967); *Beacon Restaurant, Inc.* v. *Adamo*, 103 R.I. 698, 241 A.2d 291 (1968); and *R.I. Opthalmological Society* v. *Cannon*, 113 R.I. 16 at 24 fn. 5, 317 A.2d 124 (1974). Also see *In re Camelot Court, Inc.*, 21 Bankr. 496 (Bankr. D.R.I. 1982), it was held that a Rhode Island liquor license may be the subject of a valid security interest under the Uniform Commercial Code.

a basis for revocation without that evidence which is challenged as having been in violation of the Constitution. Nor could it be sufficiently attenuated from the original seizure.[12] We do do not have present the attenuation existing in *Janis*, 454 fn. 27. Instead, we have the man sought to be controlled holding two weapons both of which are equally tainted. This was recognized in *Calandra* where it was determined that:

> "In the usual context of a criminal trial, the defendant is entitled to the suppression of, not only the evidence obtained through an unlawful search and seizure, but also any derivative use of that evidence. The prohibition of the exclusionary rule must reach such derivative use if it is to fulfill its function of deterring police misconduct.

Nor does this case or a case of its kind present the practical considerations taken into account by the Court in *Lopez-Mendoza* which acted in that case to mitigate in the Court's opinion the likely deterrent value of the exclusionary rule.

Also, unlike the considerations taken into account on the benefit side in *Lopez-Mendoza*, we do not have a situation where the Tiverton Police and the local Licensing Board have any scheme, comprehensive or otherwise, for deterring Fourth Amendment violations by its officers.

Lastly, we do not have present here, as was noted in *Lopez-Mendoza* the element of the deterrent value of the exclusionary rule in alcoholic beverage license revocation proceedings being undermined by the availability of alternative remedies on the part of the licensee, 52 USLW 5193. In all actuality in this type of proceeding, the licensee has no other alternative available to him.

[12] The present case, although intrasovereign, is similar to *Elkins* v. *United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1169 (1960) where the Court indicated that the assumed interest of criminal law enforcement officers in the criminal proceedings of another sovereign counterbalanced the attenuation sufficiently to justify an exclusionary rule.

The weighing process in this type of situation was further refined in the *Lopez-Mendoza* decision when the Court indicated that "Deterrence must be measured at the margin." 52 U.S.L.W. 5193. In going to the margin in the instant case, the measure is clear that the deterrence value in applying the exclusionary rule to alcoholic beverage license revocation proceedings is considerable.

This alone, however, is not sufficient. To complete the balancing process, the social costs of applying the exclusionary rule to those proceedings must be determined and considered. It was determined by the Court in *Lopez-Mendoza* that a certain uniqueness existed on the cost side of the scale. That uniqueness was based upon the determination that to apply the exclusionary rule to deportation proceedings would permit, allow, or encourage "continuing violations of the law" in that the alien would be enabled to continue to remain within the United States unlawfully. There is no such uniqueness in the instant case. The items once seized by the Tiverton police officer left the business premises of the Respondent licensee, and, although their actual whereabouts are unknown, it is believed that those goods were not returned to the business premises. Therefore, we have a situation where there is not the unique factor of a continuing violation of the law by applying the exclusionary rule in the instant case.

Nor, do we have, as was determined to be present in *Lopez-Mendoza* an express public policy which would be clearly frustrated by application of the exclusionary rule to the revocation proceedings. The constable's blunder in the instant case does allow the licensee to continue in his business activity of selling alcoholic beverage licenses. But this does not allow him to continue in the commission of an on-going crime.

Further, as was decided above, the alcoholic beverage license revocation proceedings are substantially adversary and are not structured to be "deliberately simple" as does the deportation hearing system. Nor is a local Licensing Board in

the State of Rhode Island faced with a very large number of revocation actions. And, as was referenced in *Lopez-Mendoza*, "it is against this backdrop that the course of applying the exclusionary rule, like the benefits, are measured "at the margin." 52 USLW 5194.

Nor do we have in this case the sober assessment of the exclusionary rule's likely costs as presented by the agency in *Lopez-Mendoza*. No such basic fundamental concerns are put forward by the Petitioner in this matter. Instead, the Petitioner presents philosophical, theoretical, strictly legal considerations which are not specific empirical considerations that are required to support the analysis of benefit versus cost.

What then are the cost factors to be considered in this case? Basically, they are the same as those that were the focal point of the Court in *Janis*, specifically the loss of concededly relevant and reliable evidence. And what occurs as a result? The licensee is entitled to continue to hold his alcoholic beverage license and thereby continue his business. This could not even be interpreted as being a contraband situation as in *Plymouth Sedan*, supra. In the instant matter, there is no other cost to be placed upon the scales.

Thus, in these circumstances, the *Janis* balance between costs and benefits comes out in favor of applying the exclusionary rule in alcoholic beverage license revocation hearings held by a local municipality. To determine otherwise, "would be anomalous. . .to hold that in [a] criminal proceeding, illegally seized evidence is excludable, while in [a] forfeiture proceeding requiring the determination that the criminal has been violated, the same evidence would be admissible." *Plymouth Sedan*, 380 U.S. at 701, 85 S.Ct. at 1251, 14 L.Ed.2d at 175.

D. Additionally, other State Courts have clearly decided the same issue in favor of the position adopted by the Rhode Island Supreme Court. *Commonwealth Liquor Control Board* v. *Mottola's 51 Tavern, Inc.*, 37 Pa. Cmwlth, 234, 389 A.2d 1213 (1978); *Pennsylvania Liquor Control Board* v. *Leonardziak*, 1 110 Pa. Super. 511, 233 A.2d 606 (1967); *Finn's Liquor Shop* v. *State Liquor Authority*, 301 N.Y.S.2d 584, 249 N.E.2d 440 (1969), *cert. den.* 396 U.S. 840 (1969); *Leogrande* v. *State Liquor Authority*, 268 N.Y.S.2d 433 (1966). The aforementioned cases are strikingly similar in nature to the instant case, and the decisions in each of those cases strongly support the reasoning adopted by the Rhode Island Supreme Court.

As *Finn* and *Leonardziak*, supra, noted, the facts in the *Plymouth Sedan* case, supra, are not that different from the Liquor Control Cases involving the license itself. In both cases, there must be a determination that the criminal law has been violated before a penalty is imposed upon the licensee. In neither situation is the State Government seeking or entitled to compensation for damages. In both cases, it is the owner or license holder that is being penalized. The Supreme Court noted that the penalty of forfeiture would be higher than the highest fine possible. In the instant case, the license holder corporation is put out of business and its principals are deprived of its income, which is potentially a greater loss than any one of a number of criminal penalties; or at least not less severe.

As *Finn*, supra, noted, without the exclusionary rule there would be no meaningful deterrence to protect against harassment. The State could effect parallel sanctions in an Administrative Proceeding without being concerned about the legality of the police measures that were employed to obtain evidence. The Petitioners, naturally, raised the issue that there would be no additional deterrence from excluding the

evidence; however, *Finn*, supra, faced this question specifically and concluded that deterrence would be served if they refused to apply the exclusionary rule.

A number of State Courts as outlined, supra, have examined, in detail, the application of the exclusionary rule in liquor license revocation proceedings, and those courts which have passed upon this issue, have given due consideration to the question of balancing the considerations involved.

In view of the fact that the existing case precedent in this area, cited supra, is clearly in favor of the exclusion of the evidence, it is important to note the rationale employed by those Courts so deciding the issue. In *Leonardziak*, supra, at page 608, the court offers insight into its reasons for applying the exclusionary rule in cases of this nature:

> "The purpose of the exclusionary rule is to compel respect for the constitutional guarantee in the only effectively available way by removing the incentives to disregard it. The policy of deterring unconstitutional activity by suppressing evidence would not be served if police, after being barred from using evidence against a licensee in a criminal court, could use the identical evidence to punish with equal or greater severity through the machinery of the Liquor Control Board."

The Court in *Finn*, supra, went on to say at page 588:

> "...the exclusionary rule rests on a theory of deterrence; that policy would not be served if the illegal official activity could be used despite unavailability in criminal proceedings to effect parallel sanctions of forfeiture in an Administrative Proceeding."

For other cases validating the application and use of the exclusionary rule in Liquor Board Administrative Hearings, see *LaPinta* v. *New York State Liquor Authority*, 294 N.Y.S.2d 947 (1968); *Malik* v. *New York State Liquor*

Authority, 294 N.Y.S.2d 948 (1968); *People* v. *McGrath*, 412 N.Y.S.2d 801 (1978); and *McPherson* v. *New York City Housing Authority*, 365 N.Y.S.2d 862 (1975).

The Petitioner, in its brief, while recognizing the wealth of authority underlying the theory that the exclusionary rule is applicable to Administrative Liquor License Revocation Hearings, reasons that the holding of *Plymouth Sedan*, supra, is inapplicable to a proceeding involving a liquor license revocation. The Petitioner's theory, for this position, is that *Plymouth Sedan*, supra, addressed itself to a proceeding which was "quasi-criminal" in nature and that Rhode Island liquor license revocation matters are civil in nature. Even acknowledging that liquor license revocation proceedings are civil in nature is correct, the Court in *Plymouth Sedan*, supra, defined its use of the term "quasi-criminal" in such a way as to make its holding applicable to the case at bar. On page 701 of that decision, the Court stated, "...a forfeiture proceeding is 'quasi-criminal' in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law." Accordingly, even if we are to assume that liquor license revocation hearing is civil in nature, we must, nevertheless, search behind the term "civil" to glean the ultimate effect of the proceeding itself. It cannot be contradicted that an adverse ruling from the Liquor Control Administrator will, indeed, result in the forfeiture of a valuable property right, and that this exacting remedy is nothing more than a penalty being imposed because of a violation of the law or of the guidelines prescribed in R.I.G.L., Section 3-5-23.

While the Petitioner acknowledges that even in jurisdictions such as New York and Pennsylvania, where liquor license revocations are considered civil in nature, the exclusionary rule applies without equivocation, the petitioner suggests that the Court de-emphasize the decisions of both those well-respected jurisdictions for the reason that both New York and Pennsylvania have adopted a "blanket application" of the exclusionary rule, which Petitioners allege Rhode Island has done.

The Petitioners further suggest that the case of *United States* v. *Janis*, 428 U.S. 433 (1976), provides solace to a jurisdiction hesitant about expanding the scope of the exclusionary rule. It is submitted that petitioner's reliance upon *Janis*, supra, is misplaced. *Janis*, supra, concerned an illegal seizure of bookmaking records by the State. Because of the illegal seizure, the State could not convict Mr. Janis of a crime; however, the United States sought to obtain $4,956.00 in wagering and excise taxes from the proceeds of the bookmaking. Mr. Janis objected on the ground that the evidence on which the United States predicated its claim was illegally seized. This Court distinguished *Plymouth Sedan*, supra, when it held that the evidence should be admitted. It determined that the matter was intersovereign and that there was no element of penalty involved.

The Petitioner in its brief, seems to accord great weight to the decisions of the Rhode Island Supreme Court in the cases of *State* v. *Spratt*, 120 R.I. 192, 386 A.2d 1094 (1978) and *Bridges* v. *Superior Court*, 121 R.I. 101, 366 A.2d 97 (1978), and the approach discussed in those decisions. The Rhode Island Supreme Court concluded that deterrence of the unconstitutional methods of police conduct in situations involving revocations of liquor licenses is on balance, of greater importance than the harm, if any, that would follow from the application of the exclusionary rule to such situations.

In essence, it is clearly logical that the Rhode Island Supreme Court, in using the balancing test in *Spratt* and *Bridges*, supra, concluded that the risk of harm to society was a more important consideration than the issue of police deterrence. Obviously, the prospect of having a convicted violator escape the consequences of his actions by application of the exclusionary rule would propose a definite threat to society. In the case at bar, the failure to revoke a liquor license does not pose a similarly severe threat to the welfare of society as would the failure to revoke a person's probation or parole.

Petitioner points to and relies upon the California case of *Rice* v. *Alcoholic Bev. Appeals Bd., Etc.*, 187 Cal. Rptr. 117 (App. 1982) where the court determined that the exclusionary rule is not applicable to an alcoholic beverage license revocation proceeding. In so doing, however, the California court did not undertake the balancing process enunciated in *Calandra* and *Janis* but, instead, made a threshold determination that the exclusionary rule did not apply to administrative proceedings such as presented to the court in that case. It is Respondent's position that the court in *Rice* was incorrect in its determination that the exclusionary rule does not apply to administrative proceedings. See *Camara* v. *Municipal Court*, supra, and *See* v. *City of Seatile*, supra; as well as *Immigration and Naturalization Service* v. *Lopez-Mendoza*, supra. And, since the Court in *Rice* did not take upon itself, as a result of its threshold ruling, to apply the balancing test which is requisite for a determination of application of the exclusionary rule to proceedings other than criminal, it is a case of insignificant precedent on this issue even though it involves a very similar factual pattern as the instant case.

Lastly, even if it were determined that the instant case was purely civil as was *Lopez-Mendoza*, the benefits of exclusion in any event, despite the character of the proceeding, outweigh any costs and require the result of exclusion.

E. The "refinements" to this Court's previous rulings on the application of the exclusionary rule, as suggested by Petitioner in its brief, should not be considered by this Court since they are, upon examination, not refinements at all. Those suggestions made by Petitioner do not hone the balancing process to a sharper certainty so as to bring it closer to the margin in its application. Instead, the refinements would eliminate the balancing process and replace it with what is basically an automatic non-application of the exclusionary rule to circumstances such as the instant case. Such a retrenchment is clearly unwarranted in light of the constitutional imperatives of the Fourth Amendment.

Recent decisions of this Court have reversed the earlier trend toward expansive application of the exclusionary rule. *United States* v. *Calandra*, supra; *Stone* v. *Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *Walder* v. *United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed.2d 503 (1954). The Court also significantly reversed that earlier trend toward expansive application of the exclusionary rule in *United States* v. *Janis*, supra.

It appears that the underlying basis of the hesitancy of this Court to continue to expand the exclusionary rule is the lack of "convincing empirical evidence on the [deterrent] effects of the rule." *Janis* at 446. Basically, the *Janis* decision took the position that whether the exclusionary rule is a deterrent has not yet been demonstrated by empirical evidence. The Court in *Janis* then determined that the Court was in no better position than fifteen years earlier when *Mapp* v. *Ohio*, supra, was decided. In determining that, the Court said: Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled. For much the same reason, it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule." *Elkins* v. *United States*, 364 U.S. at 218.

Respondent believes that compelling empirical evidence has surfaced and should be strongly considered by this Court in its decisions of application and extension of the exclusionary rule. First, that empirical evidence is contained in and considered in some detail by this Court in the case of *Immigration and Naturalization Service* v. *Lopez-Mendoza*, supra. In *Lopez-Mendoza*, at 5193, the Court states that "...and perhaps most importantly, the INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers." The

decision then spells out in some detail the workings of that comprehensive scheme. Ultimately, the INS is lauded by the Court for having such a scheme in place. Unfortunately, the Court in *Lopez-Mendoza*, did not make the effort to explore why such a comprehensive scheme for deterring Fourth Amendment violations is in place. It is submitted by the Respondent that the reason for this comprehensive scheme results from the knowledge of INS that without such a scheme evidence seized by them would be subject to exclusion by the exclusionary rule. Can there be any other reason for adopting and implementing such a comprehensive scheme directly related to the Fourth Amendment rights of citizens? I think not. Unfortunately, the Court in *Lopez-Mendoza* overlooked this facet of that comprehensive scheme and, instead, utilized it as a significant basis for determining not to apply the exclusionary rule stating that the scheme "...does reduce the likely deterrent value of the exclusionary rule." *Id.* at 5193. The shunting aside of this empirical evidence is unfortunate for two reasons. The first reason relates to the lament that no such empirical evidence exists. It exists but is apparently ignored. The second reason is because, as noted in *Janis* at 443, the judicial creation of the Fourth Amendment exclusionary rule came "comparatively late" in the legal process. Having arrived comparatively late, the rule should be given additional time to work its benefits, as with the INS, before it is either seriously eroded or discarded altogether. Again, since the rule came "comparatively late" in our jurisprudence, we must consider the long-term and go for distance as concerns whether or not the rule works the "strong medicine" that its proponents claim it to be. Certainly, the comprehensive scheme developed by the INS, as noted in *Lopez-Mendoza*, would indicate that the rule is indeed a medicament. This perspective of the long term was noted by Mr. Justice Brennan in his dissent in *Calandra* where he made reference to a commentator's remarks:

> "If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. *Over the long term*, this may integrate some Fourth Amendment ideals into the value system or norms of behavior of law enforcement agencies." Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 756 (1970) (Emphasis supplied).

The concept of "going for distance" as concerns Constitutional imperatives was referred to in *Miller* v. *United States*, 357 U.S. 301, 313 (1958), where it was stated that:

> "[I]nsistence on observance by law enforcement officers of traditional fair procedural requirements is, *from the long point of view*, best calculated to contribute to that end. However much in a particular case insistence upon such rules appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." *Miller* v. *United States*, 357 U.S. 301, 313 (1958). (Emphasis supplied).

To continue to retrench from the constitutional imperative protected by the exclusionary rule both promotes lawlessness at a price[13] and fosters the mentality on the part of law officials that it's easier to gain forgiveness than permission.

Lastly, on this point of the availability of empirical evidence, reference is made to the recent study undertaken on behalf of the National Center for State Courts. The three-year study of the search warrant process in seven United States cities has found that although such warrants are viewed as a major protection of privacy and property rights, they are rarely sought by law enforcement officials because it is a "hassle" to obtain them.

Once a warrant is obtained, however, it usually stands up, the study found. Motions to suppress were filed in only 39 percent of the cases studied; only 5 percent of those motions were granted, and only a small fraction of those successful challenges resulted in dismissal of a case, according to the study.

The yet-unpublished study, prepared for the National Center for State Courts in Williamsburg, Va., also concluded that "the exclusionary rule, though seldom invoked, does serve as a disincentive to police officers to misuse or abuse their authority," and that "new broad exceptions to the warrant requirement and exclusionary rule do not appear necessary," especially if some improvements to the warrant process are made.

The study, which covers seven unnamed cities, was conducted by two lawyers—Richard Van Duizend, a staff attorney at the center, and Charlotte A. Carter, a former staff attorney—and Prof. L. Paul Sutton, director of the criminal justice program at San Diego State University.

Among the improvements suggested in their report are several aimed at ending the practice of judge-shopping found

[13] In the words of Mr. Justice Brennan's dissenting opinion in *Calandra* at 365, "In other words, officialdom may profit from its lawlessness if it is willing to pay a price."

in some cities. The practice, which the report said undermines the standard of review contemplated by the Fourth Amendment, could be reduced by having an administrative judge or court administrator monitor the warrant review process and deal with "apparent work load disparities" promptly, or by assigning the review of warrants to a single judge or magistrate for a set period of time.

The researchers concluded that a "properly administered and supervised search warrant process can protect privacy and property rights without significantly impeding effective law enforcement."

But the study found that the process now often is "burdensome, time-consuming, intimidating, frustrating and confusing, and there are many easier ways to get the evidence or otherwise make a case against the accused," and added that "many police officers tend to regard the warrant option as a last resort."

To encourage the use of search warrants, the report recommended such practices as a telephone application process, which it found had cut in half the application time in one city, and the use of a central switchboard to extending court hours to ensure that judges and prosecutors are available for expeditious review of warrant applications.

And noting that the definition of "probable cause" for obtaining a warrant remains "elusive" even after the Supreme Court's ruling last year in *Illinois* v. *Gates*, 103 S.Ct. 2317, the report recommended that instead of waiting for appellate decisions to clarify the standard, a task force of judges, prosecutors, defense lawyers, legal scholars and police officers develop a set of guidelines that could address the major issues presented to judges and magistrates who review search warrants.

Conclusion

The *Janis* balance between cost and benefits comes out in the instant case for applying the exclusionary rule in administrative proceedings civil in nature but having a quasi-criminal result in an intrasovereign situation. The application of the exclusionary rule to an alcoholic beverage revocation proceeding is justified because it adds significant protection to fundamental Fourth Amendment rights. The compelling objective of deterring Fourth Amendment violation requires this result. It is certainly appropriate to extend and apply the exclusionary rule in administering proceedings when the police have searched premises known to be licensed for the sale of liquor and have turned over the fruits of the search to the administrative agency empowered to revoke the license.

Such an approach neither endangers time-honored doctrines applicable to the administration of criminal justice nor makes a nullity of the prohibition against unreasonable searches and seizures under the Fourth Amendment. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasion of privacy. See, *Eaton* v. *Price*, 364 U.S. at 273-274 (Opinion of Mr. Justice Brennan).

Respondent therefore respectfully requests that the decision of the Rhode Island Supreme Court be affirmed.

Respectfully submitted,

JOHN H. HINES, JR.
RHODE ISLAND STATE DEPARTMENT
OF BUSINESS REGULATION
LIQUOR CONTROL ADMINISTRATION
100 North Main Street
Providence, Rhode Island 02903
Attorney for Respondents

APPENDIX A

Rhode Island General Laws

3-7-21. Appeals from local boards to administrator. — Upon the application of any petitioner for a license, or of any person hereby authorized to protest against the granting of a license, or upon the application of any licensee whose license shall be revoked or suspended by any local board or authority, the liquor control administrator shall have the right to review the decision of any local board, and after hearing, to confirm or reverse the same in whole or in part, and to make such decision or order as to him shall seem proper, but such application shall be made within ten (10) days after the making of the decision or order sought to be reviewed; and notice of said decision or order shall be given by said local or licensing board to the applicant within twenty-four (24) hours after the making of its decision or order; and such decision or order shall not be suspended except by the order of the liquor control administrator.

APPENDIX B

Rhode Island General Laws

42-35-9. Contested cases — Notice — Hearing — Records. — (a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include:

(1) a statement of the time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved;

(4) a short and plain statement of the matters inserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved and detailed statement shall be furnished.

(c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(d) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) The record in a contested case shall include:

(1) all pleadings, motions, intermediate rulings;

(2) evidence received or considered;

(3) a statement of matters officially noticed;

(4) questions and offers of proof and rulings thereon;

(5) proposed findings and exceptions;

(6) any decision, opinion, or report by the officer presiding at the hearing;

(7) all staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case.

(f) Oral proceedings or any part thereof conducted under the provisions of this chapter shall be transcribed on request by any party. Stenotypists, occupying positions within the state service as hearing reporters for any state agency, and who report stenographically the proceedings in administrative hearings and also the taking of depositions in their capacity as reporters for a state agency shall be paid at the rate established by § 8-5-5 from the requesting party provided however, the state agency shall not be required to compensate said stenotypists for said transcript.

(g) Findings of fact shall be based exclusively on the evidence and matters officially noticed.

42-35-10. Rules of evidence — Official notice. — In contested cases:

(a) irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the superior courts of this state shall be followed; but, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be submitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary matters may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

(b) documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original;

(c) a party may conduct cross examinations required for a full and true disclosure of the facts;

(d) notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

42-35-14. Licenses. — (a) Whenever the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.

(b) Whenever a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date.

(c) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency sent notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of such license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

APPENDIX C

Rhode Island General Laws

42-35-15. Judicial review of contested cases. — (a) Any person who has exhausted all administrative remedies available to him within the agency, and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. Any preliminary, procedural, or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a complaint in the superior court of Providence county, or in the superior court in the county in which the cause of action arose, or where expressly provided by the general laws in the sixth division of the district court, within thirty (30) days after mailing notice of the final decision of the agency or, if a rehearing is requested, within thirty (30) days after the decision thereon, provided, however, that any person who is aggrieved by a final decision concerning the assessment or determination of any tax, interest or penalty made by the tax administrator must pay the amount of such tax, interest or penalty to said administrator as a prerequisite to the filing of such complaint. Copies of the complaint shall be served upon the agency and all other parties of record in the manner prescribed by applicable procedural rules within ten (10) days after it is filed in court, provided, however, that the time for service may be extended for good cause by order of the court.

(c) The filing of the complaint does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) Within thirty (30) days after the service of the complaint, or within further time allowed by the court, the agency

shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency shall modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings or decision with the reviewing court.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
